United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1668

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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KATHLEEN M. FINNERTY, individually and on behalf of all other persons similarly situated,

Plaintiff-Appellant,

- against -

JAMES L. COWEN, individually and as Chairman of the Railroad Retirement Board, and

CASPAR WEINBERGER, individually and as Secretary of Health, Education, and Welfare,

Defendants-Appellees.

APPELLANT'S BRIEF

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ON THE BRIEF:

ELLEN ZWEIBEL
ROLF M. OLSEN, JR.
Law Students

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The decision below was rendered by James T. Foley, D.J., N.D. N.Y.

QUESTIONS PRESENTED

Where a recipient of both Social Security and Railroad Retirement benefits was charged twice as much for employment earnings as other persons who receive the same amount of benefits under only one program, and where she had her benefits suspended to recoup alleged overpayments without prior notice and hearing or a determination under the waiver statute as to fault, hardship and equity:

(1) Was it error for the District Court to hold that an administrative review was a necessary pre-condition to a Constitutional attack on the statutes and regulations which cause such a result, when the administrative review could not resolve the Constitutional questions in the case?

(2) Was it error for the District Court to decline mandamus jurisdiction to compel federal officials to perform statutory and Constitutional duties.

(3) Was it error for the District Court to deny interstate commerce clause jurisdiction when the action challenges sections of the Railroad Retirement Act, explicitly legislated under the Commerce Power?

(4) Was it error for the District Court to deny jurisdiction on the amount in controversy where the facts and Constitutional issues would establish the $10,000 amount?

I - STATEMENT OF THE CASE

Appellant, an elderly widow, represents a class of persons who receive retirement benefits under both the Social Security and Railroad Retirement Acts. Benefits under the two programs are coordinated so that each month appellant receives no more than her maximum entitlement had she been eligible under only one Act. (45 U.S.C. §228e(g) ¶2.)

Occasionally, appellant has found it necessary to supplement her retirement benefits through part-time jobs. In 1970, she earned approximately $1,946 from employment. This was $266 more than the $1,600 [1/] the Social Security Act permitted a recipient to earn and continue to receive full benefits. In accordance with §403(f) of the Social Security Act, appellant paid to the Social Security Administration one half of her 'excess employment earnings' for those months in which her earnings exceeded the permissible amount.

On June 1, 1972, appellant received a notice (A. p. 28) from the Railroad Retirement Board stating that, based on her 1970 income as reported to the Social Security Administra-

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1/ All figures are based on the amounts in effect in 1970.

tion, she had been overpaid $133 (half of her 'excess employment earnings') and therefore her benefits were being suspended for two months, effective immediately. The notice advised appellant that she could appeal the overpayment determination within six months. The notice did not, however, advise appellant that she might be eligible for waiver of recoupment under 45 U.S.C. §228(i)(c), 20 C.F.R. §255.10-12 or that the Board's regulations provided for other, less drastic methods of repayment. (20 C.F.R. §§255.4-9, 255.13-14.)

Upon inquiry, appellant learned that both the Railroad Retirement and Social Security Acts required remittance of one half of her 'excess employment earnings'. The amount required to be forfeited is identical under both programs, as the Railroad Retirement Act §228(e)(i)(1)(ii) merely incorporates by reference 42 U.S.C. §§403(e), (f), and 409 of the Social Security Act. In effect, members of appellant's class must forfeit all their 'excess employment earnings,' although they receive no greater benefits than persons who receive benefits under only one program. The latter forfeit only half those earnings.

In December, 1973, appellant commenced a class action in the United States District Court, Northern District of New York against Caspar Weinberger, Secretary of Health,

Education, and Welfare and James L. Cowen, Chairman of the Railroad Retirement Board, seeking to enjoin the Railroad Retirement Board's procedures which do not provide for prior hearings, as violative of both Fifth Amendment due process and the waiver provision of the Railroad Retirement Acts and further seeking to enjoin enforecment of those sections of the Social Security and Railroad Retirement Acts which cause discrimination in benefit allocation. Appellant alleged jurisdiction based on 28 U.S.C. §§1361 (mandamus); 1337 (commerce clause); 1343(3); 1331 (federal questions); §10 of the Administrative Procedure Act (5 U.S.C. §§701-704) (review of determinations); and 1346(2). (A. pg. 16) Appellant by motion sought designation as a class action, convening of a three-judge court and a preliminary injunction. (A. pg. 29). Upon motion by defendants, Judge James T. Foley dismissed the complaint for failure to exhaust administrative remedies and alternatively for lack of subject matter jurisdiction. (A. pg. 14).

POINT I

IN A CONSTITUTIONAL CHALLENGE TO FEDERAL ADMINISTRATIVE PROCEDURES AND FEDERAL STATUTORY PROVISIONS, EXHAUSTION OF ADMINISTRATIVE REMEDIES IS NOT REQUIRED WHEN THOSE REMEDIES WOULD NOT REACH THE LEGAL ISSUES PRESENTED.

Appellant is not contesting the merits of an administrative determination on her entitlement to benefits. This case presents three clearly defined questions of Constitutional and Federal law: (1) Whether the Railroad Retirement Board's recoupment procedures violate the due process requirement of the Fifth Amendment by suspending benefits without prior notice and an opportunity for a hearing; (2) Whether the Railroad Retirement Board violates 45 U.S.C. §228(i)(c), 20 C.F.R. §§255.4-9, 10-12, 13-14 and the Fifth Amendment to the Constitution by failing to advise recipients of waiver of recoupment provisions and failing to afford recipients an opportunity to apply for waiver or alternative repayment measures prior to the Board's commencing recoupment; (3) Whether §228e(i)(1)(ii) of the Railroad Retirement Act and §§409 and 403(f) of the Social Security Act violate the First and Fifth Amendments of the Constitution by discriminating against persons eligible for benefits under both programs.

Under these sections, recipients in appellant's class are denied all their 'excess employment earnings' while other recipients similarly situated in all material respects forfeit only one half of those earnings.

The issues presented in this case could not have been resolved by the administrative process. On June 1, 1972, appellant received a letter from the Railroad Retirement Board informing her that because of an alleged overpayment, her benefits were being suspended for two months, effective immediately. The notice did not advise appellant that she could apply for a waiver of recoupment or arrange for alternative methods of repayment.

The Railroad Retirement Board did not inquire as to whether Mrs. Finnerty, an elderly poor widow, had sufficient funds on June 1, 1972 to meet her current daily needs; whether Mrs. Finnerty was waiting for her June 1st check to pay rent, medical bills, purchase medicine or food; whether it would be less of a hardship for her to repay any overpayments actually established gradually over the next few months.

There was no administative route through which Mrs. Finnerty could have protested the propriety of the Railroad Retirement Board's suspension procedures and thereby obtain effective relief from her immediate loss

of funds. The suspension notice advised Mrs. Finnerty that she could request a review of the overpayment determination within six months, but the only issue before the Appeals Board would have been whether there had been an overpayment as defined by the Federal statutes. The Appeals Board would not reach the first two issues raised here as to whether the recoupment procedure itself violated Mrs. Finnerty's Constitutional and statutory rights. Further, it could not resolve the third issue to declare portions of the Railroad Retirement and Social Security Acts unconstitutional. 2/

2/ Of the cases cited by the District Court which required exhaustion, only one involved a constitutional challenge. Bartley v. Finch, 311 F. Supp. 876 (E.D. Kentucky 1970) aff'd. sub nom. Bartley v. Richardson, 404 U.S. 980 (1971). The Distict Court Judge's opinion in Bartley did not consider the futility of exhaustion. Further, the two cases are not analogous. In Bartley only one Federal Statute and agency was involved, while in appellant's case, two statutes are challenged and one administative agency could not make determinations affecting another. The other cases relied on are inapposite. Gaston v. Finch, 312 F. Supp. 1327, 1329 (E.D. Kentucky) and Moore v. Celebrezze, 252 F. Supp. 593 (E.D. Pa. 1966) aff'd 376 F.2d 850 (3rd Cir. 1967) involved recipient's attempts to submit a second identical claim after the time to appeal the first claim had expired. Jones v. Steiner, 481 F.2d 392 (5th Cir. 1973), Craig v. Finch, 416 F.2d 721 (5th Cir. 1969) cert. denied 397 U.S. 953 (1970) and Gregory v. Railroad Retirement Board, 201 F.2d 53 (6th Cir. 1952) all sought review of factual administrative determinations after the time permitted for appeal had lapsed. In Huseman v. Finch, 424 F. 2d 1237 (10th Cir. 1970) a court action was commenced while the administrative review was still pending.

The District Court also found that under 45 U.S.C. §§228k, 355 (f), the action should have been commenced in the Court of Appeals. That section, however, only governs petitions for judicial review of an Appeals Board's determination on an individual claim. The standard of review there would be whether the Appeals Board's factual determination could be supported by the weight of the evidence.

Exhaustion of administrative remedies has not been required in analogous circumstances where a party challenges the essential adequacy of his administrative remedy and not the correctness of the administrative decision directly. Givens v. Poe, 346 F. Supp. 202 (W.D. N.C. 1972), a class action by public school pupils protesting suspension from classes without a prior hearing, speaks directly to this issue:

> "The question presented is the due process or fairness of the procedures by which discipline in public schools is administered, rather than the substantive correctness of the disciplinary decision or punishment itself; therefore, exhaustion of administrative remedies is not required". at 203. (original emphasis)

See, generally, Francois v. Bushell, 325 F. Supp. 531, at 533 (N.D. Calif. 1971).

The reasoning in Deering Milliken, Inc. v. Johnston, 295 F.2d 856 (4th Cir. 1961) is also relevant. There an employer sought judicial review of a second remand to a trial examiner by the National Labor Relations Board. The court rejected the National Labor Relations Board's contention that the availability of a general method of administrative review foreclosed judicial review of all issues:

> "Here, however, there is no available administrative remedy. If hearings are held before a trial examiner pursuant to the second remand order, the plaintiff will have no right to attack there the propriety of the Board's action in again

> remanding the case. Nor will it there have any effective right to assert its contention that the second remand order and the holding of extended additional hearing pursuant to it constitute a present denial of its rights under Section 6 of the Administrative Procedure Act". at 866.

The third issue presented in the instant case involves two Federal statutes as they interrelate. It is their combined action which has adverse effects on the class. The Railroad Retirement Board and the Social Security Administration do not have jurisdiction to effect decisions or actions of each other. Further, an administrative appeal of the overpayment finding could not have considered the Constitutionality of the two Federal statutes challenged: 3/

> "...federal agencies have neither the power nor the competence to pass on the Constitutionality of administrative or legislative actions. See Oesterich v. Selective Service Local Board No. 11,

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3/ In Public Utilities Commission of California v. U.S., 355 U.S. 534, 539 (1958) the Supreme Court spoke generally to this issue. "The issue is a constitutional one that the Commissioner can hardly be expected to entertain. If...an administrative proceeding might leave no remnant of the constitutional question, the administrative remedy plainly should be pursued. But where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defined and judicial relief sought as the only effective way of protecting the asserted constitutional right".

393 U.S. 233 at 242, 89 S. Ct. 414, 21 L. Ed. 2d 402 and cases cited therein (Harlan, J., conqurring)."
Murray v. Vaughn, 300 F.Supp.688,at 695(R.I. 1969) (exhaustion not required of ex-Peace Corps volunteer challenging the Constitutionality of his expulsion from the Peace Corps and subsequent Selective Service reclassification).

An exception to the general requirement of exhaustion of administrative remedies has been widely applied in cases challenging the Constitutionality of Social Security statutes and regulations. In Morris v. Richardson, 346 F. Supp. 494 (N.D. Ga. 1972), vacated on other grounds 409 U.S. 464 (1972), a case challenging the Constitutionality of Social Security Act provisions disqualifying certain illegitimate children, the court held:

> Although 42 U.S.C. §405 specifically precludes judicial review until the Secretary of HEW has issued a final decision, its purpose is only to delay judicial review until (1) findings of fact are made by the Secretary or (2) the Secretary had an opportunity to correct a lower level administrative error. The case at bar presents neither of these problems since there are no factual issues in dispute and the Secretary is bound by 42 U.S.C. §403(a) to deny these illegitimate children equal shares in the survivors' benefits of their deceased father. The only remaining issue is the constitutionality of §403(a). That issue is not proper for agency review and is a question that has been especially reserved for the courts. Thus, exhaustion of administrative remedies not only would prove fruitless but also be inappropriate". at 495.

See also Gainsville v. Richardson, 319 F. Supp. 16 (D.C. Mass. 1970) at 18, reduction of benefits because of employment income; Diaz v. Weinberger, 361 F. Supp. 1 (S.D. Florida 1973) at 3, durational residency requirement for aliens seeking supplemental medical insurance; Griffin v. Richardson, 346 F. Supp. 1226 (D.C. Md. 1972) at 1230, reduction of benefits for certain illegitimate children; Martinez v. Richardson, 472 F.2d 1121 (10th Cir. 1973) at 1125, termination of home provider benefits without a prior hearing; Reed v. Gardner, 261 F. Supp. 87 (D.C. C.D. Calif. 1966) at 92, requirement that medicare applicant declare non-membership in subversive organizations.

The futility of administrative review in Constitutional challenges to statutory provisions was directly demonstrated in Williams v. Richardson, 347 F. Supp. 544 (W.D.N.C. 1972) where the Court quotes the Secretary of HEW's response to interrogatories,

> "He [the Secretary] says further that he has no power to declare §403(a) unconstitutional; that he has never declared any federal statute unconstitutional; that he has had this same claim presented several times before by other claimants and that neither he nor any of his predecessors have ever adjudicated a claim on grounds that a section of the Act is constitutionally invalid". at 548.

The requirement that appellant exhaust administrative review before applying for judicial review presupposes

that the administrative remedy is an effective one. Marsh v. County School Board of Roanoke Co., 305 F.2d 94 (4th Cir. 1962).

In the instant case, the Railroad Retirement Board's administrative hearing on overpayment would not review and enjoin its own recoupment procedures, nor would it declare sections of the Railroad Retirement Act and Social Security Act unconstitutional and enjoin their enforcement. The legal issues presented should be reviewed by the District Court.

II - FEDERAL JURISDICTION

A. Introduction

Appellant, in a class action, seeks an injunction against the administration of the Railroad Retirement and the Social Security Acts which reduce benefits because of earned income twice as much for members of appellant's class as for other recipients and which recoup overpayments without prior notice and hearing, in violation of due process and equal protection guarantees. In its decision below, the District Court, Judge James T. Foley sitting, dismissed the action in part for lack of federal subject matter jurisdiction, thereby denying appellant's substantial constitutional claims a federal forum in which to seek a resolution. 4/

4/ State court relief is inadequate and quite possibly unavailable in the instant proceeding in which injunctive and declaratory relief is being sought against federal officials. A well established rule of the New York State courts provides that no state court may control the manner in which a federal agency performs or attempts to perform its functions and duties under a federal statute. Cf. Armand Schmoll, Inc. v. Federal Reserve Bank, 286 N.Y. 503, 37 N.E. 2d 225 (1941); Wasservogel v. Meyerowitz, 300 N.Y. 125, 89 N.E. 2d 712 (1949). This rule has its roots in Supreme Court decisions precluding state habeas corpus relief for federal prisoners, Tarble's Case, 13 Wall. 397, 20 L. Ed. 597 (1872) and barring state mandamus of federal officers, McClung v. Silliman, 6 Wheat 593 (1821). See also Pennsylvania Turnpike Comm'n v. McGinnes, 179 F. Supp. 578 (E.D. Pa. 1959) aff'd per curiam 278 F.2d 330 (3rd Cir. 1960).

(fn. 4 continued next pag

Substantive constitutional rights are a mere nullity without a forum for their enforcement. While Congress has undoubted power to limit or even to deny federal jurisdiction, Sheldon v. Sill, 8 How. 440, 12 L. Ed. 1147 (1850), Wright, Law of Federal Courts, 2nd Ed., (1970), p. 26, serious constitutional problems arise when such limitations prevent an actual case or controversy from reaching resolution in a judicial forum. 5/ As Judge Chase, writing for the Second Circuit in a case challenging the retroactive denial of certain benefits conferred in the Fair Labor Standards Act suggested, Congressional power in this area must be bounded by the

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fn. 4 cont'd from preceding page

Furthermore, the instant proceeding is a class action in which appellant represents all other persons similarly situated. It is clear that under the New York class action rule set forth in §1005(a) of the Civil Practice Laws and Rules, such an action may not be maintained within the state courts. See Hall v. Coburn Corp. of America, 26 N.Y. 2d 396 (1970); Onofrio v. Playboy Club, 244 N.Y.S.2d 485 (App. Div. 1st Dept. 1963) rev'd 15 N.Y.2d 740 (1965).

5/ See Cortright v. Resor, 325 F. Supp. 797 (E.D.N.Y. 1971) rev'd on other grounds 447 F.2d 245 (2nd Cir. 1971) cert. denied 405 U.S. 965 (1972); Murray v. Vaughn, 300 F. Supp. 688 (D.R.I. 1969); West End Neighborhood Corp. v. Stans, 312 F. Supp. 1066 (D.D.C. 1970); Hart and Wechsler: The Federal Courts and the Federal System, (2nd Ed. 1973) by Bator, Shapiro, Mishkin, & Wechsler, at pp. 1158-1162.

limits of due process:

> While Congress has the undoubted power to give, withhold and restrict the jurisdiction of the Courts other than the Surpeme Court, it must not so exercise that power so as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.... Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2nd Cir. 1948) cert. denied 335 U.S. 887 (1948).

See also, in general, Hart and Wechsler: The Federal Courts and the Federal System (2nd Ed. 1973) by Bator, Shapiro, Mishkin & Wechsler, at pp. 313-375.

Therefore, fundamental due process requires that the Federal District Court must have the power to review and enjoin deprivations of Federal constitutional rights by federal officials:

> Few more unseemly sights for a democratic country operating under a system of limited governmental power can be imagined than the specter of its courts standing powerless to prevent a clear transgression by the government of a constitutional right of a person with standing to assert it. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 409 F.2d 718, 723 (2nd Cir. 1969) reversed on other grounds 403 U.S. 388 (1971).

As set forth below, appellant submits that jurisdiction for the instant proceeding may be properly based on §1361 mandamus, infra B, §1337 commerce power, infra C, and §1331 general federal question power, infra D.

B. Mandamus

Mandamus-type relief has been held appropriate to compel Federal officials to both perform constitutional duties and to exercise discretion in a rational manner. In a closely analogous case, Longevin v. Chenango Court, Inc., 447 F.2d 296 (2d.Cir.1971) the Court of Appeals in this circuit approved §1361 as the applicable jurisdictional basis to review the constitutionally claimed rights of tenants in Federally-funded housing to an administrative hearing prior to rent increases. Likewise in Cortright v. Resor, 325 F. Supp. 797 (E.D.N.Y. 1971), (447 F.2d 245) (2nd Cir. 1971) reversing on the merits aff'd as to jurisdiction), cert. denied 405 U.S. 965 (1972); jurisdiction was founded on §1361 where plaintiff's alleged deprivation of her First Amendment right to free speech:

> It is equally well established that mandamus may be used to correct abuse of discretion by a federal officer, particularly, if the abuse constitutes a violation of constitutional rights... [cites omitted].
>
> The instant action has at its heart allegations that military officers acted so as to violate Cortright's constitutional rights and constitutional rights of members of his class. If these allegations have merit, the military officers acted outside the scope of their discretionary authority. In light of these allegations, section 1361 provides a basis for jurisdiction. 325 F. Supp. at 812 per Weinstein, J.

See also Murray v. Vaughn, 300 F. Supp. 688 (R.I. 1969) (due process and freedom of speech); Burnett v. Tolson, 474 F.2d 877 (4th Cir. 1973) (free speech); Walker v. Blackwell, 360 F.2d 66 (5th Cir. 1966) (freedom of religion); Long v. Katzenbach, 258 F. Supp. 89 (M.D. Pa. 1966) (freedom of religion); National Association of Government Employees v. White, 418 F.2d 1126 (D.C. Cir. 1969) (due process and free speech).

1. Due Process and Prior Hearings

Appellant asserts that the Railroad Retirement Board has breached two constitutional duties by (1) summarily suspending her benefits without affording her a prior opportunity to be heard on either the correctness of the Board's overpayment determination or her eligibility for statutory waiver of recoupment and (2) failing to give appellant any prior notice before taking such action.

Factually indistinguishable is Elliot v. Weinberger, 371 F. Supp. 960 (D. Hawaii, 1974), invalidating the identical policy of the Social Security Administration in recouping overpayments without a prior opportunity to contest it or to be considered for waiver. In finding mandamus jurisdiction, the Hawaii District Court first

recognized that the requirements for mandamus, a right to the relief sought and defendant's clear duty to perform the act in question, can properly be based on the application of a Supreme Court ruling (371 F.2d at 966 and cases cited therein). The Elliot Court then held that Goldberg v. Kelly, 397 U.S. 254 (1970) provided the requisite constitutional right and duty:

> The application of Goldberg to this case is simply inescapable. Since most social security recipients depend upon their full benefits for the necessities of life, the adverse impact of an erroneous suspension or reduction upon them is great. Starvation may be slower if benefits are reduced or suspended rather than terminated as in Goldberg, but some recipients will suffer nonetheless. As the Goldberg Court noted, the government has an interest in welfare as a guard "against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity," 397 U.S. at 265 90 S. Ct. at 1019. So is the Social Security Act "...designed for the protection of society, and enacted to alleviate the burdens which rest on large numbers of the population because of the insecurities of modern life, particularly those accompanying old age, unemployment, and disability,..." Sayers v. Gardner, 380 F.2d 940, 942 (6th Cir. 1967). As with welfare, the same governmental interests that counsel the provision of social security benefits, counsel as well its uninterrupted provision to those eligible to receive it, and pre-recoupment hearings are indispensable to that end. See Goldberg, 397 U.S. at 265, 90 S. Ct. at 2006."
> Elliot v. Weinberger supra at 970 [footnotes omitted].

See also Martinez v. Richardson, supra, finding 1361 jurisdiction in case challenging the constitutionality of terminating medicare payments without a prior hearing.

As noted in Elliot v. Weinberger, supra, "Attempts to distinguish Goldberg, supra, on the ground that fact issues are not present in recoupment cases, or on the ground that the evidence involved is more reliable, are futile. Issues of fact arise in virtually all contested recoupment situations". 371 F. Supp. at 971. 6/

The section under which the Railroad Retirment Board determined that appellant had been overpaid illustrates how easily facutal issues arise. Appellant's notice stated she had been overpaid in the amount of $133 because of income reported to the Social Security Administration, two years prior. Two separate categories of factual issues emerge.

First, was the income received derived from wages or self-employment earnings so as to even require a reduction of benefits. The cases that have considered this point have required the resolution of complicated

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6/ See also 371 F. Supp. at 966-967 statistics showing that of the small percentage of claimants who question overpayment determinations, about 73% obtain reversal.

factual issues. 7/

Second, even when income is clearly wage earnings, under the statute, the reduction is applied not to the total annual income figure but only to those months in which the wages exceeded the benefit level proscribed. 8/

Further, factual issues are presented by Railroad Retirement Act §228(1)(c) which specifically prohibits recoupment of overpayments when the recipient is without fault and recoupment would be against equity and good conscience.

The regulations, 20 C.F.R. §255.10 through 255.12, set forth guidelines for the Railroad Retirement Board's

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7/ Administrative determinations under this section have involved the characterization of subchapter S corporate dividends as a wage substitute [Ludeking v. Finch, 421 F.2d 499 (8th Cir. 1970) (Board's determination sustained) contra Weisenfeld v. Richardson, 463 F.2d 670 (3rd Cir. 1972) (Board's finding not supported by substantial evidence)], assessing whether active control was relinquished after the transfer of the business to the recipient's wife [Gordon v. Finch, 437 F.2d 253 (8th Cir. 1971)], and assessing actual hours engaged in self-employment Miller v. Richardson, 333 F. Supp. 218 (S.D.N.Y. 1971).

8/ In appellant's case, the Railroad Retirement Board simply applied the reduction section to her 1970 earnings without considering whether appellant's earnings in any one month were exempt from reduction. On the yearly figure, Railroad Retirement Board assessed overpayment in the amount of $133. However, as stated in paragraph 4 of the affidavit of Robert P. Flynn (A-40), appellant had only earned in excess of the monthly earnings in six months during 1970 and only $73 in deductions for excess earned income were appropriate.

decisions on when waiver will apply. The "fault" with which the recipient will be charged depends on the complexity of the circumstances and the degree of knowledge which can be imputed to the recipient.

For cases discussing the application of these standards, see generally Morgan v. Finch, 423 F.2d 551 (6th Cir. 1970) (recipient's good faith error as to the character of commission he earned after retirement does not qualify for waiver, as fault under the regulation is not limited to bad faith), Gruver v. HEW, 426 F. 2d 1195 (D.C. Cir. 1969), cert. denied 397 U.S. 977 (1970) recoupment of overpayments one year later is not against good conscience and equity where recipient had other sources of income to meet current needs); Miller v. Richardson, 333 F. Supp. 218 (S.D.N.Y. 1971) (degree of care required in reporting self-employment income varies with the complexity of the facts and the capacity of the payee to understand); Burrow v. Finch 431 F.2d 486, 492 (8th Cir., 1970) (false, reckless or negligent statements at the time of filing the application).

If the Secretary determines that the claimant was "without fault," claimant "should have the opportunity to put on the record all facts pertaining to her personal financial condition" before a decision on recoupment is made. Sturdevant v. Celebrezze, 239 F. Supp. 745, 748 (E.D. Pa. 1968). Findings must be made with respect to the claimant's living

expenses, and whether his current financial resources are sufficient for ordinary needs. Irvin v. Hobby, 131 F. Supp. 851 (N.D. Iowa ED 1955). Although the courts are divided on the question of whether the Secretary or the claimant has the burden of proof with respect to the above outlined adjustment issues, the courts uniformly require that claimants be afforded the opportunity to present evidence and argument bearing on their present financial expenses and resources. Hays v. Finch, 306 F. Supp. 115, 121 (W.D. Pa. 1969), Barone v. Cohen, 296 F. Supp. 524 (D.N.J. 1969). 9/

2. Statutory Duty to Determine Fault, Hardship and Equity Prior to Recoupment

The language of 45 U.S.C. §§228(c)(i) is unambiguous: "There shall be no adjustment until" the Railroad Retirement Board makes a determination regarding fault, hardship and equity. Appellant asserts alternatively (1) that the Railroad Retirement Board has flagrantly abused its discretion by promulgating regulations which do not provide for a prior determination of fault, hardship and equity, as required in the waiver of recoupment section; (2) that the

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9/ Burrow v. Finch, 431 F.2d 486 (8th Cir., 1970) (Secretary has burden of proof), Minton v. Celebrezze, 318 F. 2d 429 (7th Cir., 1963) (claimant has burden of proof).

Railroad Retirement Board has not performed its ministerial duty to waive recoupment of overpayments from exempt persons. Mandamus is the proper basis for relief for both these contentions.

While mandamus may only properly be used to compel an official to perform a non-discretionary duty, the exercise of discretion is not without limits.

In Work v. United States ex rel. Rives, 267 U.S. 175, 45 S. Ct. 252, 69 L. Ed. 561 (1925), Chief Justice Taft noted the scope of mandamus when he stated at 177-178, 45 S. Ct. at 252:

> Mandamus issues to compel an officer to perform a purely ministerial duty, it cannot be used to compel or control a duty in the discharge of which by law he is given discretion. The duty may be discretionary within limits. He can not transgress those limits, and if he does so, he may be controlled by injunction or mandamus to keep within them.

See also Harmon v. Bruckner, 355 U.S. 579 at 581-582 (1958) and cases cited therein; U.S. Ex Rel Schonberg v. Commanding Officer, 403 F.2d 371 (2nd Cir. 1968).

Nor is mandamus relief defeated by the fact that a statute may require judicial construction in order to determine what duties it creates. The court can construe the statute and then determine if the agency's conduct is within permissible bounds. Carey v. Local Bd., 297 F. Supp.

252 note 2 aff'd 412 F.2d 712 (2nd Cir. 1969) challenging a selective service regulation and citing Roberts v. U.S., 176 U.S. 221, 231 (1904).

The graveman of appellant's complaint is that the Railroad Retirement Board does not consider the facts required by the statute before it acts and thereby recovers overpayments from persons who ultimately would be found exempt under the statute. Many recipients of Railroad Retirement benefits are totally dependent upon those benefits for basic, daily necessities and expenses. Withdrawal of those benefits, even for a short time causes severe financial hardship and emotional trauma. The clear language of §228 shows that this hardship is to be avoided even when there is an actual overpayment.

Common sense dictates that the Board's practice of recouping overpayments first and asking the relevant questions on fault, hardship and equity later defeats the purpose of the waiver section. The decision to recoup is made without a factual basis.

Administrative determinations or regulations made without considering relevant factors transgress the bounds of discretion and must be set aside. See generally, Shannon v. HUD, 436 F.2d 809 (3rd Cir. 1970) challenging HUD's procedures for approving low-income housing construction sites which failed to consider the impact on

racial concentration. See also Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608 (2nd Cir. 1965).

Mandamus lies to conform the agencies' actions to the statutory requirement. See Davis v. Romney, 355 F. Supp. 29 (E.D. Pa. 1973) finding mandamus jurisdiction in an action by Philadelphia residents to compel HUD to incorporate local housing code standards into the department's regulations when approving homes for federally insured mortgages.

C. Jurisdiction is Present Under 28 U.S.C. §1337

1.

28 U.S.C. §1337 provides that:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

It is well established that claims presented to the court under this section need not satisfy any minimum jurisdictional amount. See Murphy v. Colonial Federal Savings and Loan Ass'n., 388 F.2d 609 (2nd Cir. 1967) at p. 614; Caulfield v. U.S. Dept. of Agriculture, 293 F.2d 217 (5th Cir. en banc, 1961) at p. 222, note 10, cert. dismissed 369 U.S. 858 (1962); and Davis v. Romney, supra, at p. 42.

This Circuit has been a leader in establishing the parameters of application for §1337. In the leading case of Murphy v. Colonial Federal Savings and Loan Ass'n., supra, Judge Friendly held that, while originally, only actions arising under the Inter-State Commerce Act were intended to be granted jurisdiction under §1337, the provision had, through the years, been extended to grant jurisdiction to actions arising under "all acts whose

constitutional basis is the commerce clause." Id. at p. 614.10/ He further held that "to found jurisdiction upon §1337, it is not requisite that the commerce clause be the exclusive source of Federal power; it suffices that it be a significant one". Id. at p. 615. See also, Moreno v. United States Department of Agriculture, 345 F. Supp. 310 (D.D.C. 1972) aff'd 413 U.S. 528 (1973).

2.

Appellant raises constitutional challenges to the Railroad Retirement Act and regulations adopted pursuant thereto. It is clear, both from the nature and subject matter of the Act, and the legislative history surrounding its enactment, that the constitutional basis of the Railroad Retirement Act of 1937 is, in substantial part, drawn from the Commerce power of the Congress. Therefore, under the standards set forth in Murphy, supra, and discussed above, jurisdiction is available to the District Court under §1337.

10/ The same "constitutional basis" test of §1337 applicability has accepted by the Third Circuit, Imm. v. Union Railroad Co., 289 F.2d 858 (3rd Cir. 1961) at p. 860, cert. denied 368 U.S. 833 (1961), and by the Fifth Circuit in Caulfield v. United States Dept. of Agriculture, supra, at p. 222 (note 10) and Sosa v. Fite, 465 F.2d 1227 (5th Cir. 1972) at p. 1229. See further, Wright, Law of Federal Courts, 2nd Ed. (1970) at p. 109 and cases cited in note 33.

In State of California v. Anglin, 129 F.2d 455 (9th Cir. 1942), the validity of a challenged revenue provision of the Carrier's Taxing Act of 1937, 45 U.S.C. §§261-273 was directly dependent upon the constitutionality of the Railroad Retirement Act of 1937. In sustaining the Act, the court found the following "rational concept concerning interstate railway employees sufficient to sustain the Railroad Retirement Act of 1937 against the charge that it is unconstitutional ....":

> That the men of our interstate railway system perform its major organic function of service to the public in transportation of its citizens and their merchandise... That it is one of the last of the great employments in which the direction of mechanical forces of high power lies in the individual judgment of the worker. That this judgment is to be exercised both in the fact of sudden emergency and with resistance to the dulling effect of sustained nerve-straining responsibility born in the monotony of years of repetition of the same task.... That one of the primary inducements to draw men of the required high character into such an organization and keep them there is the certainty that it, the living entity to which they belong, will afford them and their dependents a secure old age. That to a man of such required character, a pension giving such security has a stronger appeal to his loyalty to his service if it is a certain internal function of the organization, than if it rests in the uncertain and insecure largess of the employer. That the employers' power to suspend and discharge is a

> sufficient provision for the elimination of the inefficient and the incompetent; that the removal of the implement of the employer largess pension will tend to improve railway management, by aiding in eliminating an employing class which depends for the efficiency of its workmen on possible largess and the fear of its loss, instead of keeping alive the inspiration of loyalty to an organization of service." Id. at p. 459.

This view of the constitutional basis of the Railroad Retirement Act of 1937 is reinforced by its legislative history. An examination of the discussion accompanying its presentation to the Congress clearly reveals that prominant in its sponsor's minds was the vital concern of an effective and safe railroad system. Recognizing that the railroad industry was the backbone of American interstate commerce, Congress sought to insure its continued viability and service to the public through protection of the worker's future, permitting him to carry on his present duties free from concern over old age or disability. As Representative Wolverton explained it to the House of Representatives:

> No one will doubt that it is mutually beneficial to all parties, the railroad company, the railroad workers, and the traveling public. It provides a sense of security for old age that will create a satisfied state of mind upon the part of the workers. It removes doubt, uncertainty as to the future

> when the worker, because of advanced age can no longer measure up to the high standards that railroading, today, requires in all of its branches. A satisfied mind, wherein worry and fear are removed, enables the worker to give attention to his duties without disturbing influences that otherwise result, thereby promoting the element of safety for the traveling public, and giving to the company a quality of service that cannot be measured in dollars and cents.
> Cong. Record, Vol. 81, Part 6, 75th Cong. 1st Sess. (1937), page 6084. [Emphasis added]

See also, Id., pp. 6081, 6082, 6085.

The foregoing discussion makes clear that the District Court has jurisdiction over challenges to the Railroad Retirement Act of 1937 under 28 U.S.C. §1337. The scope of §1337 jurisdiction within the Federal courts is very broad. Courts, relying upon the vast Congressional commerce power delineated in recent Supreme Court decisions 11/ and upon the "significant" rather than "exclusive" source of Federal power test set forth by Judge Friendly in Murphy, supra, 12/ have established jurisdiction over actions challeng-

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11/ See, eg., Perez v. United States, 402 U.S. 146 (1971); United States v. Darby, 312 U.S. 100 (1940).

12/ See discussion, p. 26, supra.

ing a multiplicity of Federal statutes under §1337. 13/

13/ National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§1381 et. seq.: General Motors Corp. v. Volpe, 321 F. Supp. 1112 (D.D.C. Del. 1970) at p. 1121, aff'd. 457 F2d 922 (3rd Cir. 1972).

Truth In Lending Act, 15 U.S.C. §§1601 et. seq.: Sosa v. Fite, 465 F.2d 1227 (5th Cir. 1972) at p. 1229.

National Housing Act, 12 U.S.C. §§1701 et. seq.: Davis v. Romney, 355 F. Supp. 29 (E.D. Pa. 1973) at pp. 42-43.

Home Loan Bank Board Act, 12 U.S.C. §1421: Murphy v. Colonial Federal Savings and Loan Ass'n., 388 F.2d 609 (2nd Cir. 1967) at p. 614.

Consumer Credit Portection Act, 15 U.S.C. §§1671 et seq.: Hodgson v. Hamilton Municipal Court, 349 F. Supp. 1125 (S.D. Ohio, 1972) at pp. 1130-1131.

Fair Labor Standards Act, 29 U.S.C. §§1750 et seq.: Houser v. Matson, 447 F.2d 860 (9th Cir. 1971) at p. 862.

National School Lunch Act, 42 U.S.C. §§1750 et. seq.: Marquez v. Hardin, 339 F. Supp. 1364 (N.D. Cal. 1969) at p. 1371.

Food Stamp Act of 1971, 7 U.S.C. 2012(e): Moreno v. United States Dept. of Agriculture, 345 F. Supp. 310 (D.D.C. 1972) at p. 313, aff'd. 413 U.S. 528 (1973).

Federal Communications Act, 47 U.S.C. §§151 et. seq.: Post v. Peyton, 323 F.Supp. 799 (S.D.N.Y. 1971) at p. 801.

Given this liberal construction, and the traditional commerce power basis for Congressional action regulating railroad companies and employees, 14/ §1337 surely provides jurisdiction over challenges to the Railroad Retirement Act of 1937. The legislative history discussed above, as well as the decision of Anglin, supra, accepting the commerce power as a constitutional basis for the Act, confirm and mandate this decision. 15/

14/ Note that §1337 has been approved of as a jurisdictional base for actions under the Railroad Passenger Service Act, 45 U.S.C. §§501 et. seq. (cf. Potomac Passengers Ass'n. v. Chesapeake & Ohio Ry. Co., 475 F.2d 325 (D.C. Cir. 1973) at p. 340) and the Railroad Labor Act (cf. Feltner v. Southern Pacific Co., 359 U.S. 326 (1959), at p. 329.

15/ A final substantial consideration also compels finding jurisdiction under §1337. As Judge Friendly indicated in Murphy, supra, at p. 615, a flexible and broad construction of §1337 is desireable since "the amount involved [in controversy] is normally of little relevance to the desireability of federal jurisdiction in Federal question cases." This is especially so in cases such as the present where official federal action is challenged. Without a broadly available federal jurisdictional provision, uncertainty of the amount in controversy and probable unavailability of state power of ajudication may preclude access to any forum, precipitating serious constitutional difficulties. Difficulties which the federal judiciary should seek to avoid. See, in general, pp. 12-14, supra.

Appellant also raised a constitutional challenge to the Social Security Act, 42 U.S.C. §§409, 403(e) and (f) as they interrelate with the Railroad Retirement Act §§42 U.S.C. 228(e)(i)(1)(ii). Appellant is entitled to benefits under both acts. The two programs are coordinated so that appellant's actual monthly benefits are no greater because of her dual eligibility than if she had only qualified under one program.

Both programs allow recipients to supplement their retirement benefits through employment earnings. There is a limited income exemption which a recipient can earn without affecting her benefits level. For earnings over the exempt amount, a recipient is required to forfeit half to continue to receive benefits.

The Railroad Retirement Act actually incorporates the employment earnings exemption schedule of the Social Security Act. However, both programs independently apply that schedule so that persons receiving benefits because of entitlement under both acts are charged twice. The adverse affect to appellant's class occurs because of the combined action of the Social Security and Railroad Retirement Acts.

From all of the above, it is clear that the Federal District Court also has jurisdiction over this claim of appellant's under the well established doctrine of "pendent jurisdiction." As set forth in the leading case of

United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966) at p. 725:

> [P]endent jurisdiction in the sense of judicial power exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority ... " ... and the relationship between that claim and the [pendent] claim permits the conclusion that the entire action before the court comprizes but one constitutional "case."

It cannot seriously be doubted that the claims presented in appellant's complaint satisfy the Gibbs test. As we have seen, subject matter jurisdiction over appellant's challenges to the Railroad Retirement Act of 1937 exist under 28 U.S.C. §1337. Appellant's additional constitutional challenge involving the Social Security Act "derive[s] from a common nucleus of operative fact," Gibbs, supra, at p. 725, and, absent a jurisdictional barrier, appellant "would ordinarily be expected to try [both claims] in one judicial proceeding." Id.

Although, as Gibbs, makes clear, pendent jurisdictional power need not be exercised in every case in which it is found to exist, a refusal by the Distric Court to hear both claims presented by appellant would constitute a clear abuse of discretion. First, it is important to note that all claims made by appellant are Federal. A

major purpose of the discretionary elements of pendent jurisdiction is to avoid constitutional limits placed on Federal court jurisdiction over state claims. Where the pendent claim presented is federal, such dangers do not exist. Further, judicial economy would dictate that such interrelated claims be resolved in one action. See further, Almenares v. Wyman, 453 F.2d 1075 (2nd Cir. 1971) at p. 1083.

D. Federal Question

Appellant's claim that the Railroad Retirement Board's recoupment procedures deny her Fifth Amendment due process and that the Social Security and Railroad Retirement Acts unconstitutionally discriminate in the allotment of benefits clearly presents a controversy arising under the Constitution and Federal Statutes. The only potential stumbling block to finding federal question jurisdiction is whether appellant can meet the $10,000 jurisdictional amount.

The Supreme Court in Lynch v. Household Finance Corp., 405 U.S.538,547(1972) indicated that it would be necessary to satisfy the amount-in-controversy requirement in suits alleging deprivation of Constitutional rights by federal officers. In applying this rule, the federal courts have considered both the fundamental nature of the rights asserted 16/ and the potential ramifications direct and indirect to the plaintiff. (See generally Carlson v. Schlesinger, 364 F. Supp. 626 (D. D.C. 1973) considering blight of military records, effect on future employment, arrest and detention; Berk v. Laird, 429 F.2d 302, 306 (2nd Cir. 1970) effect on future earning capacity.

16/ Murray v. Vaughn, 300 F. Supp. 688 (D.C. R.I. 1969); West End Neighborhood v. Stans, 312 F. Supp. 1066 (D.D.C. 1970); Faulkner v. Clifford, 289 F. Supp. 895, 899-901 (E.D. N.Y. 1968)

The complaint will not be dismissed unless it appears as a legal certainly that less than $10,000 is at issue. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938).

In the instant case appellant has been deprived of basic Constitutional rights and there are serious potential damages which may be established at trial. The affront to due process by the Retirement Board's summary suspension of benefits has been discussed at length infra.

Appellant and members of her class are also being penalized for the past exercising of their rights to pursue the profession of their choice. To obtain coverage under both acts, a person must either have changed their profession or worked in a different industry than their spouse. This dual coverage does not give them any greater benefits, yet, solely because of it, their benefits are reduced twice for employment earnings.

A person's choice of employment in inseparable from his choice as to where he lives and who he associates with, both fundamental protected rights. (See generally NAACP v. Alabama, 357 U.S. 449 (1958); Shapiro v. Thompson 394 U.S. 618 (1969)). The courts have held "the right to hold specific private employment and to ... follow [a] profession ... within the liberty and property concept of the Fifth Amendment." Greene v. McElroy, 360 U.S. 474 (1958); and that right has been given

Constitutional protections in a wide range of situations. See generally Pickering v. Board of Education, 391 U.S. 563 (1968); Perry v. Sinderman, 408 U.S. 593 (1972); Bell v. Burson, 402 U.S. 535 (1971).

As to damages provable at trial, the potential damages to an elderly widow from the sudden cessation of benefits could include inability to pay for andobtain medical assistance creating serious health dangers, inability to pay for such other necessities of life as adequate shelter, food, clothing, transportation and utilities, which all can have traumatic effects. It is important to note that nearly two-thirds of retired single workers and one-half of all aged couples rely on federal retirement and disability programs for more than 50% of their income. These benefits are almost the sole means of support (over 90% of the total income) for 32% of retired workers, and 14% of elderly couples. Senate Report on the Aging, 197 No. 93-147, Page 21.

Retirement benefits are intended to replace lost wage earnings. In Sniadach v. Family Finance Corp, 395 U.S. 337 (1969) the Supreme Court emphasized the drastic consequences of a sudden loss of wage income.

> "A prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to sup-

> port..., compel[ling] the wage earner, trying to keep his family together, to be driven below the poverty level."

See also Nash v. Florida Industrial Commission, 389 U.S. 235 (1967).

CONCLUSION

There was no administrative procedure which appellant could pursue to afford her effective relief. The Railroad Retirement Appeals Board and the Social Security Administration could not have issued orders enjoining the enforcement of each other's statutes, nor could they have declared statutes and regulations unconstitutional. Further, in considering the correctness of an overpayment determination, the Appeals Board would not have rendered the failure of the Railroad Retirement Board to give prior notice and hearings on benefit suspensions and waiver.

Jurisdiction for this class action is properly founded on 28 U.S.C. §1361 to compel performance of constitutional and statutory duties of federal officials; §1337 to declare unconstitutional and enjoin enforcement of sections of a statute whose constitutional basis is, in large part, the Commerce Clause of the United States Constitution; and §1331, general federal question jurisdiction.

The decision of the District Court, dismissing appellant's amended complaint and denying appellant's motion for designation as a class action and for the convening of a three-judge court must be reversed,and the action remanded for consideration of:

1) Designation of a class;

2) Convening of a three-judge court; and

3) The granting of a preliminary and permanent injunction.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KATHLEEN FINNERTY, individually and on behalf of all other persons similarly situated, Plaintiff, -against- JAMES L. COWEN, individually and as Chairman of the Railroad Retirement Board; and CASPAR WEINBERGER, individually and as Secretary of Health, Education & Welfare, Defendants.	AFFIDAVIT OF SERVICE BY MAIL Index No.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

LAURA VILLAFANE being duly sworn, deposes and says:

Deponent is not a party to the above action, is over 18 years of age and resides at 316 West 94th Street, N.Y.C.

That on the 31st day of May, 1974, deponent served the within Appellant's Brief & Joint Appendix

upon Brian F. Mumford, Asst. U.S. Att'y.,U.S. Dept.of Justice, U.S. Courthouse & Post Office, Northern Dist. of N.Y.,Albany, N.Y. 12207,

the address designated by said attorney for that purpose by depositing a true copy of same in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Laura Villafane
LAURA VILLAFANE

Sworn to before me this
31st day of May 1974.

Jonathan A. Weiss

JONATHAN A. WEISS
Notary Public, State of New York
No. 31-4207275
Qualified in New York County
Commission Expires March 30, 1975

JONATHAN A. WEISS
Notary Public, State of New York
No. 31-4207275
Qualified in New York County
Commission Expires March 30, 1975